Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXA...

NO. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF WASHINGTON, PETITIONER
V.
NEIL CHRISMAN, RESPONDENT

on writ of certiorari to the Supreme Court of the State of Washington

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BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA AND J.W. CONLEY, INSTRUCTOR, HOUSTON POLICE ACADEMY, HOUSTON POLICE DEPARTMENT

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CONSENT OF PARTIES

All parties have consented to the filing of this brief of amici curiae. Letters of consent have been, or are being, lodged with the Court as of the time of filing hereof.

INTEREST OF AMICI CURIAE

The Legal Foundation of America ("LFA") is a nonprofit, tax-exempt corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The law of search and seizure has reached a point at which it detracts seriously from the ability of the criminal justice system properly to perform its most important functions. LFA has previously appeared as amicus curiae in this Court to urge this view in Mi-

chigan v. Summers, —— U.S. —— (1981), decided earlier this term. LFA believes that the decision below in the instant case is a misapplication of the fourth amendment that would harm the criminal justice system, impacting adversely upon both the control of crime and the interests of arrested persons. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Officer J.W. Conley is a Houston Police Officer of ten years' experience and is Instructor at the Houston Police Academy. His duties include the teaching of subjects relevant to the case at bar, including proper procedures for the making of arrests. The opinion of the Washington Supreme Court in this case would, if followed, make the coherent training of new officers in this important subject more difficult for Officer Conley and others like him throughout the country. The Washington Court disapproved, as "illegal," Officer Daugherty's explanation that he accompanied his arrestee in this case because "we just don't release people from custody." But Officer Conley believes Officer Daugherty's statement was correct. All police training books, including those used by Officer Conley, teach emphatically that without exception, an arrested person should never be allowed to leave the officer's presence, for the safety of the officer, the arrestee, and others. This is a sensible procedure, and Officer Conley wishes to continue teaching it. On the other hand, there are many occasions in which reasonable requests from an arrested person might prompt an officer to allow him to go briefly to his residence or to some other place. Officer Conley wishes to conduct police training that would enable officers to act humanely and courteously in such situations. The opinion of the Washington Supreme Court creates an insoluble dilemma: it would prevent Officer Conley, and others like him across the nation, from teaching new officers to respect the dignity of the persons they take into custody in such situations, while at the same time following procedures fundamentally necessary to the making of safe arrests.

STATEMENT OF THE CASE

Officer Daugherty of the Washington State University Police Department, while making an investigation of an unrelated incident at one of the University's dormitories, happened to view a person he believed to be a minor in possession of alcohol in violation of State law. This individual, Carl Overdahl, was carrying a bottle of gin outside the dormitory. Officer Daugherty asked Overdahl to show him his identification. Overdahl replied that it was up in his room on the eleventh floor, and he asked Daugherty for permission to obtain it. Rather than permit Overdahl to disappear into the labyrinth of the dormitory, Daugherty accompanied him to the eleventh floor. At no time did Overdahl give any indication that he was displeased with this accompaniment, and at no time did he vary from his stated intention of retrieving his identification from his room. It is conceded by all parties that Overdahl was under arrest for being a minor in possession of alcohol at the time and that the obtaining of the identification was at his request.

When Overdahl reached his room, he found the door ajar, opened it further, left it open, and went in with the ostensible purpose of finding his identification. The record indicates at several points that Officer Daugherty was in the hallway at this time. The Washington Supreme Court characterized his location as either at the threshold or slightly inside the room; the record supports the conclusion that he was outside at the relevant time. Officer Daugherty observed marijuana seeds and a marijuana pipe in plain view on the table next to which Overdahl's roommate, Neil Chrisman, the respondent in this case, was sitting. Upon seeing Officer Daugherty, Chrisman became visibly nervous. He looked away, then looked back. He got up and approached a cabinet, then withdrew his hand. He placed a metallic box on a desk and moved away. Overdahl was apparently looking in a drawer, ostensibly for his identification, during this time. Upon seeing the marijuana seeds, Daugherty entered the room, examined them, and advised both defendants of their Miranda rights. He asked whether they had other drugs in the room. After a brief discussion, during which both individuals indicated they understood their rights and were waiving them, Chrisman handed the

officer a box containing three small bags of marijuana. Daugherty radioed for assistance; Officer Kenny responded. Further warnings, private conference between Overdahl and Chrisman, and the signing of a consent-to-search form followed, and the search revealed more marijuana as well as LSD.

From these circumstances, the Washington Supreme Court ultimately concluded that Officer Daugherty had conducted an "unlawful search" of Overdahl and Chrisman's room by accompanying Overdahl to the threshold and viewing the marijuana. This "search" was accomplished not by Officer Daugherty's ransacking of dresser drawers; it was accomplished by his eyes and by the "intrusion" of his standing at the threshold. It was apparently the Washington court's position that Officer Daugherty should have either released Overdahl scot free after arresting him or denied him the opportunity to obtain identification.

SUMMARY OF ARGUMENT

Amici curiae will not attempt to duplicate here the detailed case analysis undertaken by the State of Washington and by Amicus Curiae Americans for Effective Law Enforcement. Instead, these amici will attempt to explain the inconsistency between the Washington Supreme Court's opinion and reasonable police procedure upon arrest.

I.

The Washington Supreme Court's holding is contrary to one of the most reasonable and basic rules of arrest procedure: namely, that an officer should never permit an arrested person to leave his sight. Arrest may precipitate unpredictable behavior even in ostensibly harmless individuals, and police training properly teaches that every arrest is therefore a serious matter that should be conducted so as to ensure safety.

II.

Because officers would run an unacceptable risk in permitting arrested persons to leave their custody, the Washington court's

decision will induce officers to refuse even reasonable requests of arrested persons to return briefly to their residences. It would so discourage field investigation of claims of innocence. The Washington court's opinion thus forces officers to act inhumanely and would subject them to increased community hostility.

III.

Professionalism means following basic procedures. A police officer should be able to follow the same basic procedures with all arrested persons as a professional assurance of safety. In addition, the interest in treating all people equally dictates that the same procedure be employed to arrest upper-middle-class college students as is used in arresting unemployed ghetto youth.

IV.

This case is controlled by cases construing the plain view doctrine and not, as the Washington Supreme Court erroneously concluded, by Chimel v. California. Chimel applies when the officer is conducting an intentional search incident to arrest, not when he happens by chance to view contraband.

V.

This Court should recognize a reasonable, good-faith mistake exception to the exclusionary rule. The disrespect that construction of search and seizure laws has created for the courts costs the criminal justice system dearly, and the refusal to recognize a reasonable, good-faith mistake exception adds nothing to the accomplishment of the exclusionary rule's purposes. The result reached in this case by the sincere efforts of the Washington court to apply search and seizure doctrine in a rational manner is an indication of the urgent need for a fundamental restructuring of this confused and counterproductive area of the law.

ARGUMENT AND AUTHORITIES

I. THE WASHINGTON SUPREME COURT'S DECISION AMOUNTS TO A HOLDING THAT

UNIVERSALLY ACCEPTED ARREST PROCEDURES ARE "UNREASONABLE" AND "ILLEGAL."

In its opinion, the Washington Supreme Court suggests that a police officer has no valid reason to maintain custody of an arrested person when that person has been permitted to return briefly to his residence, unless the officer has concrete advance evidence that the arrestee will escape, destroy evidence, or assault the officer. State v. Chrisman, 619 P.2d 971, 974 (1980). Such a suggestion, if followed, would needlessly jeopardize the lives of officers, arrested persons and others. Academicians in both criminal law and police science observe that arrested persons are often prompted to engage in inappropriate behavior by the fact of arrest itself, and that consequently even ostensibly harmless individuals may prove dangerous to themselves or to an arresting officer.

A. Police Science teaches that arrest may precipitate unpredictable behavior even in ostensibly harmless individuals, and that every arrest should therefore be taken seriously and be conducted safely.

The American Bar Association, for example, has published the following:

> Most persons stopped for interrogation do not constitute any threat to the safety of the interrogating officer. This is true even though they may be guilty of some offense. But recognizing that most persons interrogated are harmless only emphasizes the fact that some are not. Officers are sometimes attacked . . . . *In addition, there is no way officers can identify in advance which suspects are likely to be dangerous.*
>
> *The officer's lack of ability to predict reliably whether a particular suspect is armed and dangerous, combined with the high degree of danger to him if he makes a wrong guess,* results in the officer's feeling that he must constant-

ly be on guard. (emphasis added)

Tiffany, *Police Action Taken for Self-Protection, in* AMERICAN BAR FOUNDATION, DETECTION OF CRIME 44-45 (1967). This work recognizes, as the Washington Supreme Court did not, that an officer meets hundreds or thousands of unpredictable arrestees in a career, and yet he cannot afford to underestimate even one.

Police training manuals bear out this common-sense notion by suggesting certain fundamentals. "The first, and foremost, of these fundamentals is that arresting people is serious business." R. CLIFT, A GUIDE TO MODERN POLICE THINKING 186-87, 192 (3d ed. 1970). Clift points out that detention of a person to ask him questions is one thing, but arrest is quite another: "if you detain him in order that he may answer for an offense, and he knows that he is being taken in for this reason, you have an arrest on your hands . . . ." The reaction of the detained person may, without warning, change to one of instinctive desperate resistance, or it may manifest itself in elaborate subterfuge designed to take the officer by surprise. *See also, e.g.*, G. SYLVAN, DEFENSE AND CONTROL TACTICS 70 (1971)(part of a law enforcement series by Prentice Hall, stating: *"Never underestimate a suspect.* . . . [Y]ou will come into contact with a great variety of people under many different circumstances. . . . Remember, you are not a mind reader. You have no way of telling what the suspect may be thinking")(emphasis in original); E. WILLIAMS, MODERN LAW ENFORCEMENT AND POLICE SCIENCE 199 (1967)(*"It is impossible to predetermine a person's reaction to police restraint"*)(emphasis added).

The majority of police fatalities occur during "routine" activities such as patrol, particularly when an officer, as here, encounters circumstances that seem innocuous but are suspicious enough to require action or investigation. R. ADAMS, T. MCTERNAN & C. REMSBERG, STREET SURVIVAL: TACTICS FOR ARMED ENCOUNTERS 26 (1980). A disproportionate number (12 percent) occur during "routine" traffic stops. Likewise, a large percentage occurs during arrests for other than common major crimes (21 percent). Nineteen percent occur during

disturbance calls and 8 percent during "investigations of suspicious persons or circumstances." Id. at 25. The assumption of the Washington Supreme Court, that an officer would have advance warning of situations in which arrests might be dangerous and could safely wait for concrete "evidence" that vigilance was justified in the particular situation, was simply unwarranted.

It is not only harm to the officer that is of concern. Underestimating an arrested person may endanger the arrestee or others. "Sometimes the arrested person will take his own life." R. CLIFT, supra, at 187. Clift makes clear that this reaction does not follow logical patterns, and it occurs with respect to persons arrested for relatively minor offenses. It "is especially apt to happen with older people, [or] with the type of criminal who has carried on . . . without the knowledge of his social class. . . . Embezzlers *and drug users.*" Id. (emphasis added). For example, Houston Police Officer John Bales had the experience of arresting a woman for the relatively minor offense of failing to give information after a traffic accident and of allowing her, alone, to use the bathroom in her home. After a lengthy wait, Officer Bales broke down the bathroom door and found the room filled with gas from a bathroom stove the suspect had opened in an effort to take her own life. Interview of Assistant Chief John Bales, Houston Police Department, by Susan Waite, in Houston, July 27, 1981. The point is not that such an occurrence was likely here; rather, it is that it is never perceptibly "likely" that an arrested person will engage in dangerous behavior, but such behavior is utterly unpredictable. Preservation of the safety of officer and arrestee alike requires that an officer remain vigilant during *every* arrest, not just during some of them.

B. Police training emphasizes, as a universal and unvarying rule, that an officer should never allow an arrested person to leave his presence. This approach is proper and reasonable.

Because arrested persons' reactions cannot safely be predicted, the only reasonable approach is for arresting officers to be

continuously observant of their actions. Thus police training books emphasize that, without exception, the arresting officer should never allow an arrested person to leave his presence. Most of the manuals stress the rule as fundamental. Many use italics or other means of emphasis to ensure that it is understood. Amici curiae have found no manuals or books that depart from this advice. Officer Daugherty's testimony that "we just don't release people from custody" was the remark of a professional, trained peace officer.

For example, the Houston Police Department uses two books to instruct new officers concerning protection of safety. One is R. ADAMS, T. MCTERNAN & C. REMSBERG, supra. This training book is widely used throughout the United States, to teach state, local and federal officers, and covers not only the use of firearms but the prevention of the need to use force in common situations, including arrests. It contains the following:

> Suspects may try to . . . [make] you look foolish or [play] on your sympathies. But *under no circumstances should you permit a suspect to move out of your immediate presence,* even if denying him a request seems harsh. A city marshal in Kansas had arrested and handcuffed a parole violator . . . . As he was being put into the patrol car, the suspect asked and was granted permission to return to his own vehicle for a moment to speak to his bewildered children alone. There he obtained a .357 cal. handgun, which he managed to fire twice at the marshal's chest even though his hands were cuffed behind him. As the marshal lay dying, the assailant stole his service revolver and fled, with [one of the children] driving the car. (emphasis in original)

Id. at 266. This rule, that an arrested person should never be permitted out of sight, is so fundamental that it is repeated throughout the book at various points. E.g., Id. at 75 (stressing that apparently "harmless" persons may act unpredictably upon detention for arrest). The Houston Police Academy also assigns, as recommended reading, P. BROOKS, OFFICER DOWN: CODE THREE (1975), which contains the same point. Id. at 136.

The same advice appears in other police training manuals. For example,

> In police files there are *hundreds of cases where policemen lost their lives simply because they allowed their prisoner to go into the bedroom to get his coat prior to going to the station, or to go to the bathroom, or to get a drink of water, lock his automobile, or any one of a number of last minute chores.* In each case, the prisoner returned with a weapon and killed the officer. (emphasis added)

R. CLIFT, supra, at 192. Clift's reasoning is directly applicable to the case at bar. Another text contains the following:

> . . . *Always keep your suspect within your sight* and maintain good control over him by giving him clear, firm verbal commands. (emphasis added)

G. SYLVAN, supra, at 70. The American Bar Association's own publications indicate how common this "keep within sight" advice is:

> The most frequently encountered police self-protection practice is ordering a suspect to keep his hands in sight.

Tiffany, supra, at 49. Tiffany points out that this is a relatively mild order and is preferable to many other means of police self-protection, including, for instance, the "frisk." Id. at 50-51. It should be pointed out that many training books recommmend not only continual visual observation, but that every arrested person be handcuffed, without regard to the offense or the person. E.g., R. CLIFT, supra, at 191-92.

Examples of harm done to police officers who failed to follow these admonitions are unfortunately numerous. An all-too-familiar story is that in which an officer attempts to break up a family disturbance, especially when alcohol is involved. In one such incident that is given as an example in a police training book, the officer told the husband to "go get your shoes and shirt on. You're going to jail." Without a word, the husband went into the bedroom, returned with a rifle, and shot and killed the officer, his wife, and himself. P. BROOKS, supra, at 136. This same scenario was repeated on September 19, 1977, when Officer David Huerta of the Houston Police Department used a suspect's tele-

phone to report his location and was killed by the suspect, who obtained a shotgun from the bedroom, where the officer had allowed him to go unattended. Interview with Assistant Chief John Bales, Houston Police Department, by Susan Waite, in Houston, July 27, 1981. In both of these situations, the murder of the police officer was preceded by no warning. Niether officer was possessed of objective "evidence" about what was to happen. Therefore, the Washington Supreme Court would hold that the simple, reasonable procedure that would have saved each officer's life (as well as that of the husband and wife in the first case) was "illegal."

In the case at bar, Daugherty knew little about Overdahl. He knew that Overdahl claimed to be nineteen years of age and was under arrest. He knew that Overdahl was in his room, looking about. As to Chrisman, he knew he was nervous, was acting erratically and was moving his hands suspiciously about objects in the room. He also knew, when he saw the marijuana seeds, that Chrisman was committing an offense. For the officer simply to assume that he could discontinue viewing his arrestee under these circumstances would have been inappropriate.

The Washington Supreme Court considered that Officer Daugherty had no reason to do what he did. 619 P.2d at 971. This conclusion was erroneous. Officer Daugherty was following universally accepted procedure for dealing with a dangerous and unpredictable situation. The potential danger of his arrest would have been enhanced by treating it as "routine," even though it was for a minor offense. The only way that acceptable levels of safety can be attained in this serious business is to follow basic rules designed to ensure safety, without exceptions. That is what Officer Daugherty was doing. Indeed, if Officer Daugherty had consciously and wilfully neglected his duty in the manner suggested by the Washington Supreme Court, he would have been subject to discipline in many police departments.

Of course, the prevalence of a practice for the safety of officers and arrestees, and its universal inclusion in training manuals as an unvarying rule, does not indicate that it should overcome the considered judgment of a court. If a police-manual

practice is unconstitutional, its uniform inclusion in books of the genre would not save it. However, the fourth amendment is intended to prohibit "unreasonable" conduct in connection with searches and arrests. The universal emphasis of this practice as a fundamental arrest procedure in both police training books and publications of the American Bar Association, together with the giving of a reason for it in the form of the unpredictability of arrestees' reactions, indicates that it is not unreasonable.

C. A police officer does not have authority to grant personal-recognizance bail, even temporarily and even to a person he believes will reappear.

The suggestion of the Washington Supreme Court that Officer Daugherty had no reason to accompany the arrestee here amounts to a recommendation that he should have released the arrestee from his custody on a promise to reappear. Such a release would constitute nothing more nor less than a discretionary decision by a police officer to admit an arrested person to bail on his own recognizance. Police officers do not have such authority. LaFave, in his treatise on Arrests, observes flatly, "None of the states studied has legislation of general applicability which authorizes the police to release, on their own recognizance, persons who have been arrested and who promise to reappear . . . . " W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 172 (1965). The only general exception is traffic offenses, for which release is usually mandatory rather than discretionary.

Legislatures throughout the nation have thus determined that it is not in the public interest to delegate the discretionary decision whether to admit an arrested person to bail to police departments. This legislative judgment seems sensible in light of the magisterial nature of the bail decision as contrasted with the job of the police officer. The Washington Supreme Court's decision would contravene this legislative judgment.

II. THE WASHINGTON COURT'S OPINION WOULD

DISCOURAGE OFFICERS FROM TREATING ARRESTED PERSONS COURTEOUSLY AND HUMANELY.

The same police manuals that emphasize continued visible custody of the arrestee also emphasize that he is to be treated with courtesy and respect. E.g., E. WILLIAMS, supra, at 185 ("Note, too, that the person you arrest is to be treated with utmost courtesy, even to the point of being made comfortable, while you transport him from one point to another"). However, the decision of the Washington Supreme Court would countermand that advice.

A. Officer Daugherty's actions in this case were the product of an attempt to treat an arrested person courteously and with dignity.

Officer Daugherty's actions in this case reflected an effort simutaneously to observe a fundamental rule of arrest—visible custody of the subject—while respecting the dignity of the person arrested to the maximum extent possible. He did not frisk Overdahl, a procedure more intrusive than accompanying him. He did not handcuff Overdahl, even though many police manuals advise doing so no matter what the offense is or who the arrestee is. Even when Overdahl and Chrisman were rummaging around in the room, with Chrisman acting nervously, he acted with restraint, observing the two for 30 to 45 seconds. With such movements, he might well have taken greater precautions than he did. He was there because he was acquiescing in Overdahl's suggestion that he retrieve his identification. He conducted himself in a manner designed to obtain information that would enable him to treat the arrestee leniently. Thus obtaining identification would have allowed Daugherty to determine whether Overdahl was, indeed underage, and would also have enabled him to learn whether Overdahl was a student near his residence, a fact that might mitigate the offense or even allow Daugherty to handle the matter without blemish to Overdahl's

record. There is no question that Daugherty came across both Overdahl's offense and Chrisman's by accident. He maintained visual contact with his arrestee with the minimum possible intrusion, not entering the room until he saw contraband. In short, this was an officer who sought to use informal means to ensure protection of the dignity of the arrested person while at the same time following correct procedure and doing his duty.

B. Police officers should be able to grant reasonable requests, or briefly to investigate claims of innocence, or to otherwise treat arrested persons courteously, without violating basic safety procedures.

There are many reasons an officer might wish to allow an arrested person to go to another location, including perhaps his residence, before taking him to jail. For example, a person may have children with him or her when arrested, and common sense would dictate that the arrested person be allowed to make arrangements for them so that they do not need to be detained by juvenile authorities. Some arrested persons require medicine, and it would be inhumane to disallow officers from ensuring that they have it. Obtaining a coat in winter, leaving off valuables or perishables, or alerting a family member of one's whereabouts are all reasons that a Houston police officer may accompany a person to his home temporarily upon arrest. The need to go to the bathroom is yet another important, if mundane, consideration for an officer seeking to respect an arrestee's dignity.

In addition, an officer may wish to conduct a field investigation of a suspect's claim of innocence during the interval between detaining and imprisoning him. It is quite common, for example, for an officer to permit a suspect to retrieve proof of automobile ownership when the apparent offense is theft. Often, an automobile that has been reported stolen is recovered by an owner who fails to notify police. A relative or friend may then be stopped driving a vehicle that is "on the hot sheet" and may protest that he has the owner's permission. Releasing such a

person without verifying the story would be irresponsible, because it is precisely the claim of most persons convicted of automobile theft. Yet it would make no sense for an innocent person to be booked, fingerprinted, photographed, and imprisoned overnight while the error is sorted out. Indeed, even those who have urged limitations upon police arrest powers have encouraged broader use of post-arrest field investigation in situations such as this. E.g., LAFAVE, supra, at 351-53 (urging greater use of "voluntary custody," by which an arrestee accompanies an officer on field investigation); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184-88 (1967)(field investigation encouraged).

The Washington Supreme Court's decision would curtail these reasonable practices by its holding that the necessary accompaniment of the arrestee by the police officer, without which such practices cannot be safely engaged in, is "illegal." The likely result is clear. In fact, the police training manuals tell the officer that given this choice, he should refuse reasonable requests. For example:

> A final admonition in the techniques and mechanics of making an arrest is that *the officer should develop a "no" complex with his prisoners. This simply means that once you have determined upon an arrest and have, in effect, made the arrest, you should allow no privileges to the prisoner.* To do otherwise than this is to invite disaster to yourself and your police colleagues. (emphasis added)

R. CLIFT, supra, at 192. It is respectfully submitted that this advice should not be forced upon police officers. It does not reflect the advice Officer Daugherty followed here. It is not the approach that a reasonable and courteous, modern officer would necessarily follow, because it would disallow reasonable visits to the home, reasonable field investigation to determine innocence, and reasonable concern for the arrested person's dignity.

C. The choice forced upon police officers by the Washington court would subject them to undeserved

community hostility.

If officers are faced with the Hobson's choice whether to violate basic safety procedures by allowing arrested persons out of their custody or whether to deny even reasonable requests by arrestees, their only sensible choice would be the latter. The Washington Supreme Court's reasoning would thus force them to select a course that would further alienate them from the community. One of the most frequent complaints against police officers concerns their handling of arrested persons. Individuals of minority race are especially likely to be hostile to police forces in general because of perceived dignitary insults. PRESIDENT'S COMMISSION, supra. If a police officer in Washington State denies the request of a parent to tend to his or her children, or to produce evidence of innocence, or to use the bathroom, he will have difficulty in communicating the notion that "I must follow this procedure because the Washington Supreme Court, in Chrisman v. State, effectively required me to act this way by saying that it would be illegal for me to accompany you."

The failure to ensure comfort and fair treatment of an arrestee, including the failure to accede to reasonable requests of the sort here at issue, sometimes reflects itself in jury verdicts. Kalven and Zeisel report that juries often acquit as a sanction to post-arrest police practices of which they disapprove. Refusal to facilitate communication with family is an example. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 318-20 (1964). If Officer Daugherty had refused Overdahl's request to obtain identification only a short distance away, any criminal defense attorney who failed to exploit this discourtesy before a jury would have missed an opportunity to represent his client fully. It is not difficult to imagine circumstances in which a refusal to accede to reasonable requests could make the officer a target of a suit under 42 U.S.C. sec. 1983. Although it is a policeman's lot to undertake unpopular actions from time to time, the decision below in the present case requires him to do so needlessly.

III. THE WASHINGTON COURT'S APPROACH WOULD

DECREASE POLICE PROFESSIONALISM AND INDUCE INVIDIOUS DISCRIMINATION.

Throughout the past fifteen years, there have been calls for more professional police. See, e.g., J. SKOLNICK, THE POLICE AND THE URBAN GHETTO 10-12 (Am. Bar Found. ed. 1968). Professionals are distinguished by the use of basic, uniform fundamental procedures, rather than ad hoc action. Professionals treat each person that comes before them equally so far as the situation allows, and they do so by following the norms of the profession.

The Washington Supreme Court failed to recognize the desirability of uniform basic procedures in a profession. Such procedures are desirable, first, because they insure against lapses of attention that can cause miscarriages of professional duty. An airplane pilot should conduct an end-of-the-runway check even in the absence of affirmative evidence that his equipment is malfunctioning. A trial lawyer should have a double-entry tickler system even if he thinks he might be able to carry all his cases in his head. A surgeon should follow certain procedures to prevent disease whether objective evidence of pathology has appeared or not. There are fundamental procedures in police work whose disregard because the case is "routine" is no less likely to produce disastrous results. The instant case deals with one of them.

There is another aspect of the case that is more subtle. The arrested person in this case was an upper-middle-class college student. An officer making such an arrest might well be required, the next day, to arrest an unemployed ghetto youth on an accusation of burglary, rape or robbery. It would be desirable, in a profession, to have procedures that would ensure both safety and courtesy and that could be applied to both arrestees equally. An observer of criminal courts on a daily basis could not, it is submitted, come away from the experience without the conviction that the administration of the exclusionary rule can contribute disproportionately to racial and class discrimination, especially since it allows for adjudication without respect to the merits. The Washington Supreme Court's opinion, which holds that a college

student must be allowed to do what an officer should never allow an arrested person to do, would unintentionally contribute to a double standard. Cf. J. SKOLNICK, supra.

This Court must, in this case, enunicate a rule that will be applicable to arrests for minor misdemeanors as well as arrests for capital crimes of murder. In another context, the Court has stressed the desirability of a single, "unitary standard of probable cause." Dunaway v. New York, 442 U.S. 200 (1979). It has recognized the need for a uniform "workable rule" for intrusions into automobile passenger compartments. New York v. Belton, 49 U.S.L.W. 4915 (U.S.S.Ct. July 1, 1981). A professional police department cannot operate with one standard for "serious" arrests and a different standard for "non-serious" ones, and recognition of the interest in a uniform workable procedure is no less needed in this case.

IV. THIS CASE IS CONTROLLED BY THE PLAIN VIEW DOCTRINE, NOT BY CHIMEL V. CALIFORNIA.

Although the Washington Supreme Court relied heavily upon Chimel v. California, 395 U.S. 752 (1969), that decision is inapposite. The following statement of the correct approach is taken from a work by four law professors who have authored one of the most widely used law school casebooks on criminal procedure:

> . . . Chimel does not affect the rule that officers may seize items observed in plain view where the officers have the lawful right to be. Thus, evidence observed in plain view within the room of the arrest, or in other rooms entered while searching for the suspect or in entering or leaving the premises could be subject to seizure.

F. MILLER, R. DAWSON, G. DIX & R. PARNAS, THE POLICE FUNCTION 334 (1971). In short, Chimel applies when the officer is conducting an *intentional* search incident to an arrest, not when he happens to find contraband by accident. Chimel simply does not affect the right of Officer Daugherty to ac-

company the person he arrested, to see what he saw, or to be where he was, and the Washington court was drawn into error when it considered Chimel as the determinative authority on these questions.

V. THIS COURT SHOULD RECOGNIZE A REASONABLE, GOOD-FAITH MISTAKE EXCEPTION TO THE EXCLUSIONARY RULE.

Even in the event that this Court should consider correct the conclusion of the Washington court that Officer Daugherty's conduct was not allowed under the fourth amendment, the exclusionary rule should not be applied here. No deterrent purpose would be served, and the disrespect that the law of search and seizure has brought upon the courts costs the criminal justice system dearly in cases such as this.

A. The Exclusionary Rule should not be applied when the purpose of deterring illegal police conduct will not be served.

In United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), the Fifth Circuit recognized "reasonable, good-faith mistake" and technical violation exceptions to the exclusionary rule. The Williams approach is carefully calibrated to serve the purposes of the exclusionary rule to the fullest. It requires that the judgmental error be an honest one—that is, that it be in "good faith." Secondly, it requires that the judgment be objectively "reasonable," so that ignorance or sloppiness will not be rewarded. The Fifth Circuit stated the latter requirement thus:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe that he was acting lawfully. Thus a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could

never qualify.

622 F.2d at 841 n.4a. The burden is on the State to prove these elements. The determination would be simple for a court hearing a motion to suppress to make because in most situations the reasonableness and good faith of the officer will be controlled by the same testimony as the determination of technical lawfulness under the fourth amendment.

The Williams opinion observes that "The Supreme Court and this Circuit have all but explicitly adopted the technical violation facet of the good-faith exception, and each has rendered several decisions that implicitly, at least, support the good-faith mistake facet . . . ." 622 F.2d at 841. The Williams opinion carefully analyzes relevant Supreme Court authority to prove this point, and that analysis of those decisions is adopted by this brief. As this Supreme Court stated in Michigan v. Tucker, 417 U.S. 433, 477 (1974),

> *The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.* By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, this deterrence rationale loses much of its force.* (emphasis added)

The Williams approach avoids upholding "willful" misconduct by its good-faith requirement, and it refrains from rewarding even "negligent" blunders by requiring objective reasonableness.

The case at bar is an example of the counterproductive application of the exclusionary rule beyond its purposes. Officer Daugherty was following procedures learned in his police training, procedures that have prevented the taking of the lives of many police officers. He did so in order to accede to the request of his arrestee in safety. To attempt to "deter" "willful" or "negligent" conduct disregarding the rights of arrested persons by sanctioning Officer Daugherty here would be an exercise in futility.

B. The principle that courts should avoid the "taint" of illegally seized evidence does not mandate the exclusion of evidence seized reasonably and in good faith. Rather, it is the needless and counterproductive exclusion of such evidence that taints a court.

A second principle that is sometimes said to underlie the exclusionary rule is that courts should avoid the taint of illegally seized evidence. Thus Mapp v. Ohio, 367 U.S. 643 (1961), justified the extension of the exclusionary rule to the States by the observation that it "gives to the courts, that judicial integrity so necessary in the true administration of justice." Courts are nondemocratic institutions without independent enforcement mechanisms. If their orders are to prevail in unpopular as well as popular causes, they must have public respect.

To the extent that there is validity to this rationale, it is the exclusion of evidence honestly and reasonably seized, not its reception, that actually taints a court.

(1) Public Impression of the Criminal Law as a Mass of Technicalities.

The first way in which the exclusion of honestly and reasonably seized evidence taints a court is by creating a public impression that the criminal law is a mass of dysfunctional technicalities. This danger was articulated by Mr. Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), as follows:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice are to nullify a sentence pronounced by a court of comptent jurisdiction in obedience to local law, and set the guilty free.

Although the error in Snyder was exclusion of the defendant from the proceedings and an improper remark by the trial judge, rather than an illegal seizure, the reasoning applies equally to the

case at bar.

(2) Haphazard Results on Guilt or Innocence.

Secondly, exclusion of reasonably and honestly seized evidence taints the criminal justice system by causing haphazard adjudication of guilt or innocence. Inconsistent results are sometimes unavoidable under the Constitution, but they should not be encouraged when unnecessary. An incident that occurred several years ago in Harris County (Houston), Texas illustrates the harm that can result. The District Attorney of Harris County presented seventy-three drug possession cases, some of which were appropriate for no-bills because of searches that would require suppression and some of which were appropriate for true bills because of searches deemed valid. The grand jury, however, no-billed all cases in both groups, in part because it was unable to rationalize differential treatment of the persons involved on the basis of distinctions in the police conduct involved. Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980. The haphazard adjudication that this grand jury impliedly condemned would not be removed by the Williams approach, but it would be lessened.

(3) Demoralizing Effect upon the Honest Police Officer.

Third, exclusion of reasonably and honestly seized evidence taints the courts by demoralizing the conscientious police officer, making him less likely, not more likely, to understand and follow fourth amendment decisions. Despite dictum in Dunaway v. New York concerning a "single, familiar standard," fourth amendment law immediately dissolves into ambiguity in a concrete factual situation. The variety of probable cause judgments is infinite. It is overlaid by a bewildering array of doctrines such as plain view, stop and frisk, inventory, exigent circumstances, consent, and reasonable detention. Procedural considerations such

as standing and burden of proof influence a variety of cases. The officer will see a seemingly reasonable seizure stuck down in one case and a borderline one upheld in the next.

Even experts complain that they cannot understand search and seizure law. As one prominent Texas criminal defense lawyer has put it,

> In determining the balance, guidelines have been spelled out by the Supreme Court. A great deal of difficulty arises in applying the many guidelines to a particular set of facts. . . . Some magistrates, judges or justices believe the exclusionary rule should be abolished, while other judges believe that the exclusionary rule should not apply when the officer acts in good faith (good faith v. bad faith). Because of the difference of opinion of the judges and justices as to what is reasonable, the decisions dealing with search and seizure appear to be in a constant state of change.

Rawitscher & Carnahan, *Search and Seizure and Suppression Proceedings, in* STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE (D. Crump ed. 1979). If the decisions induce this reaction in a criminal law scholar, they must resemble a roulette wheel to the officer who risks his life in good faith, only to be told that his conduct was illegal and must be "deterred" by suppression. Research confirms what common sense suggests: Police misconduct is most common in situations in which police officers perceive that they are unlikely to obtain justice in the court system. Cf. N. JOHNSON, L. SAVITZ & M . WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 11 (1962).

The present case is an example. In an earnest effort to make logical sense of the case authority as applied to this fact situation, the Washington court followed Chimel v. California, a case that, it is submitted, is inapposite. It reached a result inconsistent with the universal teaching of police training. Officer Daugherty is consequently told that he was "willful" or "at the very least, negligent" in the words of Michigan v. Tucker. This message can only engender disrespect for courts in those who work to enforce the law.

(4) Appearance of Shifting and Inconsistent Appellate Decision-Making.

Fourth, the present administration of the exclusionary rule places appellate courts in ostensibly shifting and inconsistent doctrinal positions. This Court, for example, has withheld suppression when the illegality has been attenuated by intervening events, the defendant has lacked standing, the challenge has arisen in a habeas corpus action, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase sentence in another case. On occasion, doctrinal justification fails to prevent the appearance of a zig-zag course; this is especially so in cases involving vehicles taken to another location, containers, and searches incident to arrest. These difficulties are the natural result of practical efforts with conflicting policy, but they create a nagging suspicion that interpretive principles cannot be reconciled with a reasonable view of the fourth amendment.

In this case, a well-reasoned dissent opposes the Washington majority. Several doctrines (e.g., attenuation of taint) might reasonably have been used to reach the opposite result in a different manner. But the real reason the evidence should not be suppressed is that in this case, which is unique on its facts, the officer acted reasonably and honestly. Forthright recognition of a reasonable, good-faith exception would go far to remove the appearance of shifting doctrine and ad hoc decision-making.

(5) Effect on the Accused: Irrelevance of Guilt or Innocence

Fifth, the exclusionary rule taints the criminal justice system by inducing the accused to believe that his guilt or innocence is not important. One popular author has written that "innocence becomes less relevant" as the criminal justice system progresses. F. L. BAILEY, THE DEFENSE NEVER RESTS 1 (1968). Disparate treatment creates cynicism in the accused. It has been identified by wardens in some states as a greater cause of prison

unrest than food, overcrowding, or conditions of incarceration. COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING 10 (1976). Although this finding was stated in the context of sentencing disparity, the same kind of prisoner cynicism is likely to be generated when disparity is caused by the exclusionary rule.

(6) Untruthful Fact Presentation to Jurors by Officers of the Court.

Finally, the exclusion of reasonably and honestly seized evidence taints the criminal justice system by presenting an untruth ful impression to the trier of fact. A conscientious defense lawyer is likely to argue to the jury that the government has not presented sufficient evidence in a trial from which evidence has been suppressed. He is likely to follow with criticism of the government for prosecution of the case without the type of evidence that is missing. The "open door" or reply doctrine would allow prosecution response if defense counsel referred by name to the specific item suppressed, but through the exercise of minimal skill, defense counsel can make a general enough reference to prevent response and still get the point across.

If the seizure was flagrantly improper, suppression may be justifiable; however, a juror is likely to feel that he has been unfairly tricked if he learns that the truth has been hidden from him by officers of the court notwithstanding a reasonable, good-faith search. Perhaps the saddest effect of this misrepresentation is its effect upon defense counsel. It is understandable that many attorneys avoid the criminal defense practice because they do not wish to be the tools of such deception.

CONCLUSION

For these reasons, and for the reasons stated in the briefs of the State of Washington and Amicus Curiae Americans for Effective Law Enforcement, the decision of the Washington Supreme Court should be reversed. The conduct of Officer Daugherty was

proper and reasonable, and it should be so adjudicated. In the alternative, this Court should recognize a reasonable, good-faith mistake exception to the exclusionary rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have accomplished service of this brief prior to filing by depositing in a United States Post Office, first-class postage prepaid, three copies each, addressed to the following, being all counsel of record, in accordance with Rule 28.3 of the Rules of this Court: Ronald R. Carpenter, Office of the Prosecuting Attorney, Whitman County, P.O. Box 30, Colfax, Wash. 99111; and Robert Patrick, Aitken, Schauble, Patrick, Neill & Charawell, P.O. Box 307, Pullman, Wash. 99163; on this the day of August, 1981.